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Supreme Court, U.S.
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No. 86-____

In The
Supreme Court of The United States

October Term, 1986

CENTRAL MACHINERY COMPANY,
an Arizona corporation,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of Arizona

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QUESTION PRESENTED

Whether an Indian Tribe's rights, privileges and immunities, including immunity from state taxes that are imposed under color of state law, which are conferred under 1) the federal Indian Trader Statutes, 25 U.S.C. §§ 261-264, the Indian Trader Regulations, 25 C.F.R. Part 140, and the Indian Commerce Clause, Art. 1, § 8; 2) the unique relationship between the federal government and Indian Tribes; and, 3) the right of Indian Tribes to govern themselves, including the right to be free from state control of commercial transactions on Indian Reservations, considered collectively or severally, constitute "rights, privileges, or immunities secured by the Constitution and laws," within the meaning of 42 U.S.C. 1983, and were interfered with and violated by state action, therefore entitling the Indian Tribe to attorney's fees under 42 U.S.C. § 1988.

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No. 86-____

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an Arizona corporation,
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Petition for a Writ of Certiorari To the Supreme Court of Arizona

Petitioner Central Machinery Company respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on December 12, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 730 P.2d 843 (1986). The opinion of Arizona Court of Appeals, Division One is reported at 730 P.2d (1985). The opinion of the Superior Court of Maricopa County is unpublished. The opinion of the Supreme Court of Arizona, the opinion of the Arizona Court of Appeals, and the decision of the Superior Court of Maricopa County are reprinted in the Appendix hereto at pages A-1 through A-30, *infra.*

JURISDICTION

The judgment and Opinion of the Supreme Court of Arizona was entered on December 12, 1986. This petition for writ of certiorari is filed on March 12, 1987, withn ninety (90) days of December 12, 1986.

This Court has jurisdiction to review the judgment of the Supreme Court of Arizona under 28 U.S.C. § 1257 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim at A-55 through A-68, *infra*, are: United States Constitution, Art. I Sec. 8; 42 U.S.C. 1983 and 1988, 25 U.S.C. §§ 261, 262, 263, 264; 25 C.F.R. Part 140 (formerly Part 251).

STATEMENT OF THE CASE

This petition seeks review of the decision of the Supreme Court of Arizona reversing an award of attorney's fees to the petitioner in the amount of $53,165. The attorney's fees were awarded to the petitioner as the prevailing party in *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980), pursuant to 42 U.S.C. §§ 1983 and 1988. Originally, in *Central Machinery*, the U.S. Supreme Court held that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, preempted Arizona's imposition of the state sales tax on the sale of tractors by Central Machinery Company, to Gila River Farms, an enterprise of the Gila River Indian Community, taking place on the Gila River Indian Reservation, Arizona.

Upon remand, Central Machinery filed a Motion for Attorney's Fees based upon 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the Indian Trader Statutes, 25 U.S.C. 261-264, and 25 C.F.R. Part 140 (formerly Part 251), in the Maricopa County Superior Court. Attorney's fees were awarded by the trial court.

The state appealed the award of attorney's fees to the Arizona Court of Appeals. The Arizona Court of Appeals

affirmed the award to the petitioner based on 42 U.S.C. §§ 1983 and 1988, and the Indian Trader Statutes 25 U.S.C. § 261-264, and 25 C.F.R. Part 140 (Formerly Part 251). The state then filed a Petition for Review with the Supreme Court of Arizona and the Supreme Court of Arizona reversed.

REASONS FOR GRANTING THE WRIT

THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

A. The Decision Below Conflicts With Governing Decisions of This Court.

Unavailability of attorney's fees under 42 U.S.C. § 1983 will severely limit the ability of American Indian Tribes throughout the United States to enforce rights and immunities afforded Indians and Indian Tribes under the U.S. Constitution and federal statutes. These federal statutes were enacted to protect the cultural integrity and trust property of Indian Tribes, and to promote Tribal self-government and economic self-sufficiency. These rights, privileges, and immunities have been secured primarily through the efforts of Indian Tribes. Efforts to obtain relief for deprivations of Tribal rights will be devastated if the decision of the Arizona Supreme Court stands.

In *Maine v. Thiboutot*, 448 U.S. 1, (1980) this Court held that 42 U.S.C. § 1983 was available to enforce violations of federal statutes by agents of a State. A cause of action exists for any party who has been injured, under color of law, through the deprivation of any "rights, privileges, or immunites secured by the Constitution and laws" of the United States. The question before the Supreme Court in *Maine v. Thiboutot*, was "whether the phrase 'and laws,' " should be read as limited to civil rights or equal protection laws. The Court held that 42 U.S.C. § 1983 encompassed claims based on purely statutory violations of federal law and further held that the attorney's fees provisions of 42 U.S.C. § 1988 were applicable.

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) recognized two exceptions to *Thiboutot* that statutory violations may be remedied by a § 1983 cause of action. The issues in *Central Machinery* are whether or not enforceable rights or immunities were created and whether these rights or immunities have been violated.

The Supreme Court of Arizona concluded that the Indian Trader Statutes do not create § 1983 enforceable rights because these statutes do not set specific acts or standards. *Central Machinery v. State of Arizona*, 730 P. 2d 843, 851 (1986) (A-15). Therefore, the petitioner is not entitled to claim attorney's fees based on § 1988.

The Arizona Court attempted to apply *Pennhurst* and initially reasoned that merely benefiting from a statute does not create "enforceable rights." The Supreme Court of Arizona interpreted the *Pennhurst* holding to mean that enforceable § 1983 rights must be measured in terms of specific and definable acts or standards. *Central Machinery*, 730 P.2d at 851 (A-15). However, the Supreme Court in *Pennhurst* concluded only that the language and legislative history at issue was ambiguous and the statute and legislative history expressed congressional preferences in a general way. Therefore, enforceable rights within the meaning of § 1983 were not established. *Pennhurst*, 451 U.S. 1, 19.

The Arizona court misapplied *Pennhurst* because the Indian Trader Statutes do contain acts and standards which are not ambiguious. Moreover, there is no indication in the opinion of the Supreme Court of Arizona that any attempt was made to ascertain whether either the intent of Congress or regulations promulgated provide the necessary specific or definite acts to establish enforceable rights.

The recent decision in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 55 U.S.L.W. 4119 (U.S. Jan. 14, 1987), clarified the enforceable rights test by providing additional guidance which should curtail further

limitations to *Thiboutot* that statutory violations may be remedied by a § 1983 cause of action.

Wright involved a challenge by tenants living in low-income housing who initiated a § 1983 action alleging that the City of Roanoke Development and Housing Authority over-billed them for utilities. The Supreme Court held that the Brooke Amendment to the Housing Act of 1937 and regulations of the Department of Housing and Urban Development (HUD) gave the dissatisfied tenants specific or definable rights to utilities. Therefore the tenants did have enforceable rights within the meaning of § 1983, and Supreme Court stated: "The intent to benefit tenants is undeniable." *Wright*, 55 U.S.L.W. at 4122.

Furthermore, HUD regulations did create an enforceable right. HUD regulations required that a "reasonable" amount for utilities be included in the rent that a Public Housing Authority be allowed to charge. The term "reasonable" was not too vague and amorphous and was held to be sufficiently specific and definite to meet the *Pennhurst* test. *Wright* U.S.L.W. at 4122. This result is in striking contrast to the overly-narrow holding of the Arizona Supreme Court.

Wright clarifies and settles the issue as to what may be considered as a specific or defined right. If persons benefit specially from the statute and if the benefit is defined in terms of reasonableness, then the persons benefiting have an enforceable right. The "reasonableness" standard obviously is capable of judicial interpretation and enforcement. *Wright*, at 4122, *Boatowners & Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 671 (9th Cir. 1983), *Keaukaha-Panewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, 1471 (9th Cir. 1984).

In evaluating how the Arizona Supreme Court applied the *Pennhurst* test in *Central Machinery*, it is necessary to ascertain if the Court did look to the statute involved, the statute's legislative history, and to regulations promulgated by the Department charged with administering the law. *Wright* 55 U.S.L.W., at 4123. It is apparent that the

Supreme Court of Arizona looked only superficially at the Indian Trader Statutes.

First, the Arizona Supreme Court did not carefully review the Indian Trader Statutes. The Indian Trader Statutes do provide standards which are sufficiently specific and definite and therefore create enforceable rights. In *U.S. ex Rel. Hornell v. One 1976 Chev. Etc.* 585 F.2d 978 (10th Cir. 1978) individual Indians were authorized to assert a claim under 25 U.S.C. § 264 which was enforced. The Arizona Supreme Court simply did not confront or distinguish *Hornell* in any way.

The failure to refer to the legislative history of the Indian Trader Statutes also is significant because the Arizona Supreme Court did have the opportunity to look beyond the Indian Trader Statutes when it discussed *Rockbridge v. Lincoln*, 449 F.2d 567 (1971). *Rockbridge* involved a successful challenge by Indians attempting to require the Secretary of the Interior to adopt and enforce certain rules and regulations governing traders doing business on the Navajo Indian Reservation. The court held that the Secretary of the Interior did not have complete discretion to regulate Indian Traders and stated:

> This does not mean that the Commissioner has unbridled discretion to refuse to regulate but rather that he shall exercise discretion in deciding what regulations to promulgate and in determining *specific quantities, prices and kinds. Rockbridge*, at 571. [Emphasis supplied]

The Secretary has the affirmative duty to exercise his discretion and to specify and define standards, thus meeting the test prescribed by *Pennhurst* for establishing enforceable rights.

There is no doubt that by ignoring the holding in *Rockbridge* and the legislative history discussed regarding the Indian Trader Statutes, as is now required by *Wright*, the holding of the Arizona Supreme Court rests on less than a firm foundation.

Finally, the regulations of the Department of the Interior, which historically have protected the rights of Indians and Indian Tribes, are also now a factor in the decision whether there are enforceable § 1983 rights. The Supreme Court in *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685, 689, (1965) discussed the Indian Trader Regulations as follows:

> Acting under authority of the statute and one added in 1901, the Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed;

And

> He [the Commissioner] has ordered that detailed business records be kept and that government officials be allowed to inspect these records to make sure that *prices charged are fair and reasonable;* that traders pay Indians in money; that bonds be executed by proposed licensees. . . . [Emphasis supplied]

Obviously, the Indian Trader Regulations provide standards that are sufficiently specific and definite and therefore create § 1983 enforceable rights. 25 C.F.R. § 140.22

A final point raised by the Arizona Supreme Court is the statement that the tax imposed by Arizona did not deprive Gila River Farms of a right, privilege, or immunity secured by the laws of the United States, and, therefore, an enforceable right did not exist. *Central Machinery*, 730 P.2d at 852 (A-16). However, in the special area of state taxation on Indian Reservations, the Supreme Court has held that when a state acts to tax Reservation Indians, individual rights are violated. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, at 181 (1973). The Court stated:

> Finally, we cannot accept the notion that it is irrelevant "whether the . . . state income tax infringes on [appellant's] rights as an individual Navajo Indian," as the State Court of Appeals maintained. 14 Ariz. App. at 454, 484 P.2d at 223. To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. *But those entities*

> *are, after all, composed of individual Indians, and the legislation confers individual rights.* This court has therefore held that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, supra, at 220 (358 U.S. 217) . . . *In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it has not jurisdiction to impose.* [Emphasis supplied].

Central Machinery, 448 U.S. 160 (1980) is factually and constitutionally consistent with *McClanahan* because both cases involved violations by the State of Arizona affecting Indians on Indian Reservations.

The Arizona Supreme Court takes great pains to show, mistakenly, that Arizona did not violate individual Indian rights by attempting to impose its transaction privilege tax. The Court translates the preemptive effect afforded the Indian Trader Statutes, which derives from the Supremacy Clause, into the conclusion that no enforceable right of Indians was affected. But, the Supremacy Clause merely provides the constitutional mechanism by which preemption occurs. The Indian Trade Statutes are constitutionally authorized by the Indian Commerce Clause, not the Supremacy Clause.

The Supremacy Clause is a common factor in all Indian cases asserting that activities on Indian Reservations are beyond the reach of states. The Arizona Supreme Court misapprehends the nature and effect of the Supremacy Clause and mistakenly assumes that legislation and regulations based on the Indian Commerce Clause cannot establish rights that may be protected by § 1983.

B. The Decision Below Conflicts With a Decision of the State of New Mexico.

The decision of the Arizona Supreme Court is in direct conflict with the opinion of the New Mexico Court of Appeals in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (Ct. App. 1986), *cert. denied*, November 3, 1986, No. 86-367 (A-31 through A-54). In fact, this case is not distinguished or even discussed by

the Arizona Supreme Court. *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), involved a successful protest to application of a New Mexico gross receipts tax on an Indian controlled school construction project located on the Navajo Indian Reservation.

Ramah is indistinguishable from *Central Machinery:* both cases were successfully litigated in the U.S. Supreme Court, and both parties took the position that states are unable to impose a tax on activities taking place on an Indian Reservation. On remand both parties sought attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988.

Ramah holds that the statute in question did create rights enforceable by § 1983 and attorney's fees were awarded based on § 1988. *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 720 P.2d 1243, 1256 (A-53). The court first acknowledged that the case was different from other § 1983 cases because it involved the unique relationship between the federal government and Indian Tribes. *Ramah*, at 1253 (A-48). The *Ramah* court had no trouble in holding that the Bureau of Revenue of New Mexico, by imposing the gross receipts tax, violated not only a right but an immunity granted to Indians. *Ramah*, at 1254 (A-49).

The right granted Indians is the right to coordinate the education of Indian children on the Reservation and the immunity is to be free of state taxation. This right and immunity stems from the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450a-450n. Congress enacted this law because of the unique relationship between the federal government and Indians and Indian Tribes. The constitutional basis for both the Indian Self-Determination Act and for the unique relationship is the Indian Commerce Clause. *Ramah*, at 1254 (A-49). Finally, *Ramah* declared that New Mexico also violated the separate and independent right of tribal self-government, and this right also is a § 1983 enforceable right. *Ramah*, at 1254 (A-50).

Conceptually there is no difference between the Indian Trader Statutes and the Indian Self-Determination and Educational Assistance Act. 25 U.S.C. §§ 450a-450n. Both laws have as their legislative authority the Indian Commerce Clause. In determining if a § 1983 action exists, it makes no difference if one law concerns the education of Indian children and the other concerns commercial transactions on Indian Reservations.

Federal courts have held that Indians may allege a § 1983 cause of action by relying on a law constitutionally authorized by the Indian Commerce Clause. In *Chase v. McMasters*, 573 F.2d 1011, (8th Cir. 1978), *cert. den.*, 439 U.S. 965 (1978) the Eighth Circuit held that a violation of 25 U.S.C. § 465 under color of state law provides a basis for Indians to bring a § 1983 claim. *See also, Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, at 1304-5 (D.Mont. 1974).

The opposing holdings in *Central Machinery* and *White Mountain Apache Tribe v. Williams*, No. 81-5348 (Ninth Circuit, Slip Opinion, August 20, 1986) on the one hand, and *Ramah* on the other, are apparent and unresolved. It is interesting to note that the Court of Appeals in Arizona, 730 P.2d 840, 142, fn.3, (A-26), and in New Mexico, *Ramah*, 730 P.2d at 1255 (A-51), easily distinguished their cases from the *White Mountain* case. All three cases successfully challenged state action attempting to collect taxes on Indian Reservations based on the preemptive effect of federal law.

The differences between *Central Machinery* and *White Mountain* stem from the statutes involved. First, the Indian Trader Statutes deal with commercial transactions on Indian Reservations which affect the lives of Indians throughout the United States on a daily basis. In addition, the Indian Trader Statutes are of long standing, first being enacted in 1790, and there is extensive legislative history which illuminates the intent of Congress. *Warren Trading Post*, at 688. Finally, the regulations promulgated by the

Department of the Interior afford great insight into how individual Indians are directly affected by regulation.

The Court in *Ramah* correctly held that a law enacted by Congress which is based on the Indian Commerce Clause creates enforceable rights cognizable by 42 U.S.C. § 1983 and that violation of those rights sanctions fees in accordance with 42 U.S.C. § 1988. Because § 1983 rights exist in *Ramah*, § 1983 rights exist in *Central Machinery*, and therefore the Petitioner is entitled to an award of attorney's fees in accordance with 42 U.S.C. § 1988.

CONCLUSION

The decision below is in conflict with *Wright v. City of Roanoke Redevelopment and Housing Authority* and with *Ramah Navajo School Bd., Inc. v. Bureau of Revenue* and should be reversed.

RESPECTFULLY SUBMITTED March 12, 1987.

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Appendix A

IN THE
SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

CENTRAL MACHINERY COMPANY, an Arizona Corporation *Plaintiff-Appellee,* v. STATE OF ARIZONA, *Defendant-Appellant,*	Supreme Court No. 18493-PR Court of Appeals No. 1 CA-CIV 7779 Maricopa County Superior Court No. C-297870

Appeal from the Superior Court of Maricopa County

The Honorable William T. Moroney, Judge

MOTION FOR ATTORNEY'S FEES DISMISSED

Opinion of the Court of Appeals, Division One
_____ Ariz. _____, _____ P.2d _____ (1985),
Vacated

Rodney B. Lewis,
Attorney for Appellee, Sacaton

Robert K. Corbin,
The Attorney General, Phoenix

Anthony B. Ching,
Solicitor General, Attorneys for Appellant

HAYS, Justice

The state petitioned this court to review an opinion of the court of appeals that upheld the trial court's award of attorney's fees under 42 U.S.C. § 1988 in favor of Central

Machinery Company. We granted review and have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), A.R.S. § 12-120.24 and Rule 23, Ariz.R.Civ.App.P. 17A A.R.S.

We granted review of the following two issues: (1) whether the court of appeals, by finding that Gila River Farms would bear legal fees throughout the litigation and that any recovery of fees by Central Machinery would be transmitted to Gila River Farms, improperly conferred standing on Central Machinery to bring a cause of action under 42 U.S.C. § 1983; (2) whether the original tax refund claim in state court is a claim within federal Civil Rights Act of 1871, 42 U.S.C. § 1983, and thereby support an award of attorney's fees pursuant to 42 U.S.C. § 1988.

This litigation has a long history. In 1974, Central Machinery Company sold a number of tractors to Gila River Farms, an enterprise of the Gila River Indian Community. Arizona state sales tax of $2,916.62 was included in the price. Gila River Farms paid the invoice amount with the understanding that if Central Machinery was not liable for the tax, the company would refund any amount it recovered from the state to Gila River Farms.

Central Machinery paid the tax under protest and, after exhausting administrative remedies, filed an action in superior court to recover the tax. *See* A.R.S. § 42-1339(B). [1] The trial court ruled that Central Machinery was not liable for the tax. The state appealed. This court reversed. State v. Central Machinery Co., 121 Ariz. 183, 589 P.2d 426 (1978). Central Machinery subsequently appealed the decision to the United States Supreme Court. The Court held that the Indian trader statutes, 25 U.S.C. §§ 261-264, preempted Ari-

[1] Repealed by laws 1985, ch. 366, § 31 (eff. July 1, 1986). *See*, now, A.R.S. § 42-124.

zona's imposition of state sales tax on the transaction [2]. Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165-66, 100 S. Ct. 2592, 2596 (1980).

On remand, Central Machinery sought attorney's fees based on the Civil Rights Attorney's fees Awards Act of 1976, 42 U.S.C. § 1988. The trial court awarded attorney's

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[2] **§ 261. Power to appoint traders with Indians**

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500. *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: And provided further, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

fees under this statute in the amount of $53,165 and the Arizona Court of Appeals affirmed the award. *Central Machinery Co. v. Arizona*, _____ Ariz. _____, _____ P.2d _____ [1CA-CIV 7779, filed June 27, 1985]. The state petitioned this court. We reverse.

The state has raised several challenges to the decision below. First, the state contends that Central Machinery has no standing to bring a cause of action under § 1983. Second, even if standing was properly recognized, the state asserts that the Indian trader statutes do not support a claim cognizable under § 1983. The state claims that not only do the Indian trader statutes not create any "enforceable rights" in favor of either Central Machinery or the Indian tribe, but the trader statutes also contain exclusive remedies that preempt any § 1983 action. Finally, the state argues that, based on the facts of this case, neither the supremacy clause nor the commerce clause provides a constitutional basis for a § 1983 cause of action.

I. STANDING

The state contends that Central Machinery is without standing because no agreement exists between Central Machinery and Gila River Farms whereby any attorney fees recovered under § 1988 would be paid back to Gila River Farms. The trial court, however, determined that such an agreement existed. On review, the court of appeals resolved this question in favor of Central Machinery.

The parties' Second Agreed Statement of Facts states:

> The Plaintiff has agreed with Gila River Farms that if *any monies are recovered* by the Plaintiff as a result of its action herein, *the Plaintiff will remit to Gila River Farms the monies so recovered* (emphasis added).

The state argues that "any monies" recovered cannot include attorneys fees and, therefore, Central Machinery has no standing to sue for recovery of the fees. The basis for the state's argument is that although the Second Agreed Statement of Facts was signed by the attorneys in June 1976, § 1988 did not become effective until October 19, 1976. The

existence or nonexistence of § 1988 does not, though, affect the validity of the agreement. The parties were capable of agreeing that all monies recovered would be turned over to Gila River Farms without having to anticipate all possible sources of monies recoverable by Central Machinery. Furthermore, Central Machinery admitted in a response to the state's motion for reconsideration that "the award of ... attorney's fees ... will be disbursed to Gila River Farms in accordance with the Agreed Statement of Facts." This admission is a binding construction of the agreed statement of facts and is sufficient to give Central Machinery standing to bring the motion for attorney's fees. We hold that Central Machinery has standing to bring this motion in its own right and is therefore a proper party to this suit.

The state also makes a quasi-standing argument. According to the state, even if Gila River Farms was eligible for an award pursuant to § 1988, Central Machinery still could not prevail. The state argues that Central Machinery is not eligible for attorney's fees because the Indian trader statutes were designed to benefit Indians and not Indian traders. The state's argument is simply an assertion that Central Machinery's standing to bring the original action does not translate into "standing" for a related § 1988 motion. We reject this argument because the United States Supreme Court has held that § 1988 is not limited to any particular subclass of § 1983 actions. *Maher v. Gagne*, 448 U.S. 122, 128, 100 S. Ct. 2570, 2574 (1980), relying on *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502 (1980). Central Machinery had standing to prosecute the original action. If the original action was cognizable under § 1983, then attorney's fees should be awarded to Central Machinery.

II. ATTORNEY'S FEES AWARD PURSUANT TO § 1988

Both parties agree that federal law controls any award of attorney's fees. Consequently, we only need determine whether attorney's fees were properly awarded under 42 U.S.C. § 1988. Section 1988 authorizes an award of attorney's fees in certain enumerated civil rights actions.

> In any action or proceeding to enforce a provision of sections 1981, 1982, *1983*, 1985, and 1986 of [Title 42],

> . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (emphasis added).

Section 1983 creates civil liability for

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution and laws*, ...

42 U.S.C. § 1983 (emphasis added).

Central Machinery argues that it is entitled to § 1988 attorney's fees because its original action for a tax refund is cognizable under § 1983. Although Central Machinery was the prevailing party in the underlying lawsuit, its successful

claim was not brought pursuant to § 1983 [3]. We must, therefore, now determine if the action for a tax refund was an action to secure "rights, privileges, or immunities secured by the Constitution and laws. . . ." If Central Machinery's original action implicated either statutory or constitutional rights protected by § 1983, then the original award should be upheld. *Maher*, 448 U.S. at 128-29, 100 S. Ct. at 2574 (1980) (§ 1988 applies to all § 1983 violations).

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[3] The issue of attorney's fees may be raised for the first time after remand of the appeal in which the plaintiff prevailed. *See, e.g., Bernstein v. Menard*, 728 F.2d 252, 253 n.l (4th Cir. 1984), *construing White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 102 S. Ct. 1162 (1982). § 1983 is a remedial statute that must be construed broadly in order to assist private plaintiffs who vindicate federal rights. *See Collins v. Chandler Unified School Dist.*, 644 F.2d 759, (9th Cir.), *cert. denied*, 454 U.S. 863, 102 S. Ct. 322 (1981), *quoting Dennis v. Chang*, 611 F.2d 1302, 1305 (9th Cir. 1980). Moreover, several courts have allowed a motion for attorney's fees even though a § 1983 action was not proven or alleged in the original complaint. For example, In *Gumbhir v. Kansas State Bd. of Pharmacy*, 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied*, 459 U.S. 1103, 103 S. Ct. 724 (1983), a motion for assessment of costs "adequately pleaded a violation of . . . civil rights under § 1983 to maintain a suit for attorney fees under § 1988, . . . " even though the motion was based upon an earlier action alleging denial of constitutional rights, not a § 1983 action. *See Fairbanks Correctional Center v. Williamson*, 600 P.2d 743 (Alaska 1979) (sole mention of § 1983 in original complaint in parenthesis in the title of the complaint); *Harradine v. Bd. of Supervisors*, 73 A.D.2d 118, 425 N.Y.S.2d 182 (1980) (original complaint alleged violation of equal protection clause); *Boldt v. State*, 101 Wis.2d 566, 305 N.W.2d 133 (complaint alleging violation of due process clauses of the Wisconsin and United States Constitutions sufficient to plead § 1983 action in suit for attorney's fees pursuant to § 1988), *cert. denied*, 454 U.S. 973, 102 S. Ct. 524 (1981); *accord, Consol. Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.) (party alleging § 1983 violation, but prevailing on other grounds, eligible for attorney's fees if § 1983 would have been an appropriate basis for relief); *cert. denied*, 469 U.S. 834, 105 S. Ct. 126 (1984); *Jackson v. Inhabitants of Searsport*, 456 A.2d 852 (Me.) (§ 1988 award not limited to those cases where court actually "passed upon a party's section 1983 claim and ruled on it in that party's favor"), *cert. denied*, 464 U.S. 825, 104 S. Ct. 95 (1983). We do not believe that Central Machinery's failure to specifically allege a § 1983 cause of action in the original complaint should serve as a procedural barrier to the claim before us.

STATUTORY BASIS FOR § 1983 ACTION

Section 1983 provides a remedy for any deprivation, under color of state law, of rights created by the United States Constitution or federal statutes. Central Machinery's original claim was that Arizona could not tax a transaction between Central Machinery and the Indians because the Indian trader statutes had preempted the field of trading with Indians on reservations. Central Machinery was successful with this argument before the United States Supreme Court.

Unquestionably, then, Central Machinery's suit vindicated an interest protected by federal law. Central Machinery argues that Maine v. Thiboutot, *supra*, recognizes such interest as within the ambit of § 1983. In *Maine*, the Supreme Court held that the phrase "and laws" in § 1983 refers to any federal law and not just civil rights laws or equal protection laws. 448 U.S. at 6-7, 100 S. Ct. at 2505. Accordingly, *Maine* has been widely construed as authorizing § 1983 actions whenever a plaintiff was adversely affected by a violation of federal law under color of state law. *See, e.g., Maine*, 448 U.S. at 11, 100 S. Ct. at 2508 (Powell, J., dissenting) ("The Court holds today, almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right"); *In re Haussman*, 96 A.D.2d 244, 468 N.Y.S.2d 375 (N.Y. App. Div. 1983); Wartelle & Loudan, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 Hast. Const. Law Quart. 487, 487 (1982) (*Maine* gave 42 U.S.C. § 1983 "an interpretation that, for the first time in the section's 110-year history, matched the breadth of its literal language"); Note, *The Application of Section 1983 to the Violation of Federal Statutory Rights—Maine v. Thiboutot*, 30 DePaul L. Rev. 651, 657 (1981) (court majority in *Maine* made expansive interpretation of § 1983).

We do not doubt that Justice Brennan's majority opinion in *Maine*, standing alone, would justify a finding that Central Machinery's original action was cognizable under § 1983:

> The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. . . .
>
> Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.

448 U.S. at 4, 100 S. Ct. at 2504. This broad language clearly would control the instant case where the state of Arizona's laws conflicted with federal laws designed to protect Indians. We believe, though, that both Central Machinery and the court of appeals rely too heavily on *Maine*.

The Supreme Court narrowed the reach of *Maine* in two subsequent landmark decisions. These decisions, *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981), and *Pennhurst State School & Hosp. v. Haldeman*, 451 U.S. 1, 101 S. Ct. 1531 (1981), establish two exceptions to the use of § 1983 to remedy federal statutory violations. It is these two exceptions, and not the broad holding of *Maine*, that are truly at issue in this case.

In *Sea Clammers*, the Supreme Court held that a federal statute containing comprehensive remedial provisions may "demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20, 101 S. Ct. at 2626. Thus, no cause of action will lie under § 1983 where federal statutes provide their own comprehensive remedy. In *Pennhurst*, the Court held that violation of federal law does not give rise to any cause of action unless Congress intended to vest enforceable rights in the injured persons. 451 U.S. at 27-28, 101 S. Ct. at 1545. Accordingly, a plaintiff may not enforce a federal statutory violation with § 1983 unless the statute creates enforceable rights.

The state argues that both the exclusive remedy exception established by *Sea Clammers* and the enforceable rights exception set out in *Pennhurst* bar the award of attorney's fees to Central Machinery. First, the state contends that Congress has so comprehensively regulated the field of

Indian trading that no § 1983 remedy exists and, therefore, no award of attorney's fees is available under § 1988. In *Sea Clammers*, the Court found a congressional intent to preclude a § 1983 action on the basis of "unusually elaborate enforcement provisions." 453 U.S. at 13-15, 101 S. Ct. at 2623. The Federal Water Pollution Control Act at issue in *Sea Clammers* authorized the government agency and states to seek civil and criminal penalties, authorized any interested person to seek judicial review of agency action, and contained two separate private suit provisions. *Id.* [4]

The Indian trader statutes do not have similar provisions. In fact, a careful reading of the Indian trader statutes reveals no comprehensive remedial provisions. 25 U.S.C. § 264 admittedly does provide that any non-Indian who trades

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[4] The Supreme Court summarized relevant provisions of the Federal Water Pollution Control Act:

> These Acts contain usually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. § 309, 33 U.S.C. § 1319. He may seek a civil penalty of up to $10,000 per day, § 309(d), 33 U.S.C. § 1319(d), and criminal penalties also are available, § 309(c), 33 U.S.C. § 1319(c). States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. § 402(b)(7), 33 U.S.C. § 1342(b)(7). In addition, under § 509(b), 33 U.S.C. § 1342(b)(7) [sic]. In addition, under § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceedings for enforcement. § 1369(b)(2).

Sea Clammers, 453 U.S. at 13, 101 S. Ct. at 2623 (footnotes omitted).

without a license "shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500. . . ." Additionally, the Indian trader statutes do authorize administrative rulemaking, *e.g.*, 25 U.S.C. § 262 ("Any person desiring to trade with the Indians on any Indian reservation shall . . . be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe. . . ."), that in turn could provide a remedial scheme. One forfeiture provision and the possibility of additional remedies, however, is hardly the type of exclusive remedy scheme contemplated by the Court in *Sea Clammers*. See *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457 (1984) (although plaintiff may have had an alternative claim under 42 U.S.C. § 1983, § 1988 attorney's fees should not have been awarded because the plaintiff's case belonged entirely within the comprehensive procedures and guarantees of the Education to the Handicapped Act (EHA); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2nd Cir.) (comprehensive enforcement scheme provided in Federal Aviation Act Act manifests congressional intent to foreclose an action under § 1983); *cert. denied*, _____ U.S. _____, _____ S. Ct. _____, 55 U.S.L.W. 3237 (1986; *accord Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467 (9th Cir. 1984) (mere reservation of right to sue in statutory scheme is not a sufficiently comprehensive enforcement scheme to foreclose a § 1983 remedy).

The state also contends that the Indian trader statutes do not create enforceable rights as defined in *Pennhurst* and therefore do not give rise to a claim for § 1988 attorney fees. In *Pennhurst*, the plaintiff claimed that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDABRA) created "enforceable rights" in favor of the mentally retarded. 451 U.S. at 6, 101 S. Ct. at 1534. The Court disagreed, holding that because the DDABRA was designed only to assist states in their treatment of the mentally disabled through a "cooperative program of shared responsibilit[ies]" between the federal government and the

states, it did not create enforceable rights. *Id.* at 22, 101 S. Ct. at 1542 (quoting Harris v. McRae, 448 U.S. 297, 309, 100 S. Ct. 2671, 2684 (1980)). Therefore, the *Pennhurst* Court concluded that it "need not reach the question whether there is a private cause of action ... under 42 U.S.C. § 1983 to enforce [the DDABRA]." 451 U.S. at 28 n.21, 101 S. Ct. at 1545 n.21. *Sea Clammers* construed the decision in *Pennhurst* not to address a § 1983 issue as requiring a determination of "whether the statute at issue ... [is] the kind that create[s] enforceable 'rights' under § 1983." *Sea Clammers*, 453 U.S. at 19, 101 S. Ct. at 2626.

Courts applying *Pennhurst* have not arrived at a uniform definition of enforceable § 1983 "rights." *See generally* Boatowners & Tenants Ass'n v. Port of Seattle, 716 F.2d 669, 671 (9th Cir. 1983) ("our review of cases from other circuits reveals divergent views of how broadly 'rights' should be construed"). Central Machinery vigorously asserts that because the Indian trader statutes were designed to specially benefit Indians, *see* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690-91, 85 S. Ct. 1242, 1245-46 (1965), Indians possess "rights" enforceable in a 1983 action. Central Machinery relies heavily on the Ninth Circuit's use of the *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975), implied right-of-action test in § 1983 actions. The Ninth Circuit has stated that enforceable rights arise if the applicable statute confers rights for the special benefit of the class to which the plaintiff belongs. *Boatowners*, 716 F.2d at 672, *citing Cort, supra.*

We think that Central Machinery reads *Boatowners* too broadly.[5] Most courts now agree that an entity does not obtain an enforceable right simply because it benefits from the statute's provisions. *See, e.g.*, Brown v. Hous. Auth. of McRae, 784 F.2d 1533, 1537 (11th Cir. 1986); Gould, Inc. v. Wisconsin Dept. of Indus., Labor, and Human Relations, 750 F.2d 608, 616 (7th Cir. 1984), *aff'd*, _____ U.S. _____, 106 S. Ct. 1057 (1986). Nothing in *Boatowners* indicates that the mere finding that a statute is intended to provide special benefit to a particular group justifies the conclusion that enforceable rights are conferred by the statute. *Boatowners* was primarily concerned with the threshhold issue of whether a regulatory statutory scheme is capable of supporting a § 1983 action. The *Boatowners* court held that the River and Harbor Improvements Act at issue, 33 U.S.C. §§ 540-633, was only intended to benefit the general public and therefore could not support a § 1983 action. 716 F.2d at 673-74. The *Boatowners* court never reached the issue before

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[5] *Boatowners* may be read as holding that the existence of special benefit creates enforceable rights. However, such a reading is inconsistent with both *Pennhurst* and subsequent Ninth Circuit cases. The statutes at issue in *Pennhurst* unquestionably specially benefitted the mentally handicapped. Nevertheless, the Supreme Court left open the question of whether enforceable rights were created. *Pennhurst*, 451 U.S. at 27-30, 101 S. Ct. at 1545-46. Furthermore, subsequent Ninth Circuit decisions have not used the special benefit test to determine whether or not a particular statutory scheme creates enforceable rights. *See* Keaukaha-Panaewa Comm. v. Hawaiian Homes, 739 F.2d 1467, 1471 (9th Cir. 1984) (the *Pennhurst* decision "implied that a[n] [enforceable] right is created when Congress mandates, rather than merely encourages a specified entitlement").

We also cannot endorse the use of the Cort v. Ash implied right of action test in § 1983 actions. *Boatowners* asserted that the use of Cort v. Ash in § 1983 actions is one of three major methods of determining the existence of enforceable rights. 716 F.2d at 671-72. In support, the court cited Perry v. Hous. Auth. of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981). *Boatowners*, 716 F.2d at 672 n.4. The court offered no other justification for the applicability of Cort v. Ash. Our review of *Perry* indicates that the Fourth Circuit did not use Court v. Ash in it § 1983 analysis. Therefore, *Boatowner's* use of Cort v. Ash is both isolated and unjustified.

this court. 716 F.2d at 673-74. *See* White Mountain Apache Tribe v. Williams, No. 81-5348, slip op. (9th Cir. Aug. 20, 1986) (the relevant focus for inquiry in a § 1983 action is not primarily whether a regulatory scheme was designed to benefit a particular group).

Courts confronting the enforceable rights issue have not clearly drawn the line that separates mere benefit from "enforceable rights." For example, the Fourth Circuit looks to the substantive provisions of statutes to determine whether § 1983 plaintiffs are granted "tangible rights" or are merely beneficiaries of general congressional policy. Only if courts can ascertain the scope of "rights" with certainty will they be enforceable in a § 1983 action. Phelps v. Hous. Auth. of Woodruff, 742 F.2d 816, 821 (4th Cir. 1984); Perry v. Hous. Auth. of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981). The Second Circuit has also recognized that a statute containing precise standards creates enforceable rights. Beckham v. New York City Hous. Auth., 755 F.2d 1074, 1077 (2nd Cir. 1985). *But see Brown*, 784 F.2d at 1536 n.3 (court chooses to concur with *Wright* and acknowledges that *Beckham* is apposite); *see also* Wright v. City of Roanoke Redev. & Hous. Auth., 771 F.2d 833 (4th Cir. 1985), *cert. granted*, _____ U.S. _____, 106 S. Ct. 848 (1985). The D.C. Circuit has said that a § 1983 action lies only when a particular course of conduct is mandated and looks to specific legislative use of words such as "shall" and "entitlement." Samuels v. Dist. of Columbia, 770 F.2d 184, 196-98 (D.C. Cir. 1985). The Third Circuit also looks to the statutory language. If statutory or regulatory language is "cast in the imperative" then enforceable rights are created. Alexander v. Pope, 750 F.2d 250, 259 (3rd Cir. 1984). *See also* Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 438-39 (3rd Cir. 1985) (mandatory language in Equal Access Act stating "It *shall be unlawful* . . . to deny equal access . . . to . . . any students who wish to conduct a meeting" creates enforceable § 1983 rights) (emphasis original).

We do not have to resolve discrepancies between various circuits in order to reach a conclusion about the enforceability of "rights" created by the Indians trader statutes. The clear thrust of *Pennhurst*, and all the cases applying *Pennhurst*, is that enforceable § 1983 rights arise only when Congress mandates specific acts or standards. Only the strength of the mandate or the degree of specificity is disputed. No specific acts are required by the Indian trader statutes. No specific standards are established by the Indian trader statutes. The statutes only grant the Commissioner of Indian Affairs discretion to establish standards that conceivably could create enforceable rights. That discretion by itself, however, merely represents general congressional intent to benefit Indians. [6]

Central Machinery's best argument is found in the right of Indian tribes to force the Commissioner of Indian Affairs to adopt rules and regulations pursuant to the Indian trader statutes. In Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) the Ninth Circuit held that the Indian trader statutes did not grant the Commissioner of Indian Affairs unlimited discretion to promulgate regulations. 449 F.2d at 572. Accordingly, Indians injured through the failure of the Commissioner to issue regulations may invoke the jurisdiction of federal courts and force the Commissioner to issue regula-

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[6] The court of appeals held that *Warren Trading Post, supra*, was dispositive of this appeal. In particular, the court held that the Supreme Court's statement that the Indian trader statutes ensure "that no burden shall be imposed upon Indian traders," 380 U.S. at 690-91, 85 S. Ct. 1242, 1245-46, created enforceable rights. Central Machinery v. Arizona, slip op. at 5-6. We believe, however, that *Warren Trading Post* merely established that the Indian trader statutes were intended to benefit Indians. *Warren Trading Post* recognized that the Commissioner of Indian Affairs could issue regulations burdening commerce on Indian reservations. 380 U.S. 688-91, 85 S. Ct. 1244-45. Congress, therefore, did not create in Indians an "enforceable right" to trade without restriction. Congress only intended that Indians trading on reservations benefit from supervision by the Commissioner of Indian Affairs. *Warren Trading Post*, therefore, cannot support the proposition that the Indian trader statutes create enforceable rights.

tions that benefit Indians in the manner Congress intended. *See* United States v. Markgraf, 736 F.2d 1179, 1183 (7th Cir. 1984) (Secretary of Agriculture may not refuse to regulate where Congress has provided standards for the exercise of discretion).

It may appear axiomatic that if Indians have the right to sue under the Indian trader statutes to force the Commissioner to act, they have enforceable rights pursuant to § 1983. *Rockbridge*, however, does not undercut our determination that the Indian trader statutes do not create "enforceable rights." *Rockbridge* centered on the discretion granted the Commissioner of Indian Affairs. The decision merely recognized that the Indian trader statutes were enacted to benefit Indians and that the Commissioner of Indian Affairs had to comply with federal statutes. *Rockbridge*, 449 F.2d at 572. *Rockbridge* did not hold that the Indian trader statutes establish the type of specific mandate enforceable in § 1983 actions.

Even assuming the Indian trader statutes created enforceable rights, however, we would not find the original action to be cognizable under § 1983. The original action for a tax refund was decided upon preemption grounds. The Supreme Court stated that "by enacting these [Indian trader] statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject.' " Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 165-66, 100 S. Ct. at 2596, *quoting Warren Trading Post*, 380 U.S. at 691 n.18, 85 S. Ct. at 1246 n.18. The Court clearly ruled that Arizona's actions did not violate any particular federal statute or regulation. "It is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations." 448 U.S. at 655, 100 S. Ct. at 2596. We are not persuaded, even assuming that an enforceable right existed, that such rights were violated. We must conclude, therefore, that the tax imposed by Arizona

did not deprive Gila River Farms of a right, privilege or immunity secured by the laws of the United States. *See* Williams, slip op. at 18 (preemption claim not involving actual conflict between federal and state statutes cannot support § 1983 action).

The original tax refund action is not, therefore, cognizable under § 1983 unless Arizona violated a right, privilege or immunity guaranteed by the United States Constitution.

CONSTITUTIONAL BASIS FOR ATTORNEY'S FEES

Central Machinery has argued that Arizona's tax violated both the commerce clause and the Indian commerce clause. U.S. Const. art. I, § 8, cl. 3. The court of appeals, however, did not look to the commerce clause but rather the supremacy clause when it held that the tax refund action was cognizable under § 1983. Central Machinery Co. v. Arizona, slip op. at 9. We hold that none of these three constitutional provisions adequately supports the award of attorney's fees.

Commerce Clause

The United States Supreme Court invalidated the Arizona tax because the Indian trader statutes regulate reservation trading in a comprehensive fashion. Central Machinery v. Arizona State Tax Comm., 448 U.S. at 165-66, 100 S. Ct. at 2596. Although the Indian trader statutes were enacted pursuant to Congress' commerce clause power, *Warren Trading Post*, 380 U.S. at 691 n.18, 85 S. Ct. at 1246 n.18, the Supreme Court did not hold, nor is there any authority for holding, that a state tax on Indians is a violation of the commerce clause. *See, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480-81 n.17, 96 S. Ct. 1634, 1645 n.17 (1976). Accordingly, no violation of the commerce clause is at issue in this case. *Cf.* Consol. Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.) (unsuccessful claim for § 1988 attorney's fees brought after state statute restricting use of sixty-five foot trailers held invalid), *cert. denied*, 469 U.S. 834, 105 S. Ct. 126 (1984).

Indian Commerce Clause

Central Machinery argues that the Indian commerce clause provides a separate constitutional basis for a § 1983 cause of action. The Indian commerce clause actually is found within the commerce clause, art. 1, § 8: "Congress shall have Power ... [t]o regulate Commerce ... with the Indian tribes[.]" Central Machinery claims that this clause, of its own force, does not tolerate a State burden directly imposed on commerce with the tribe itself on its own reservation. The Supreme Court, however, has stated:

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce.

Washington v. Confederated Tribes, 447 U.S. 134, 158, 100 S. Ct. 2069, 2083 (1980) (citations omitted).

Central Machinery cites three decisions of the United States Supreme Court to support its position. All three cases simply established Congress' expansive power to control Indian commerce. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866), held only that certain Indian tribes, under the exclusive control of Congress, were not subject to state taxation. *Id.* at 755-57. United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876), held only that Congress has the power to freely regulate Indian commerce. *Id.* at 194. Similarly, United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865), established simply that the Indian commerce clause authorized federal regulation of Indian commerce occurring completely within one state's boundaries. *Id.* at 418. The cases do not define state behavior that violates the Indian commerce clause.

The Supremacy Clause

We disagree with the court of appeals determination that rights secured by the supremacy clause are enforceable in a § 1983 action. Every federal treaty, statute or regulation is

"secured" by the supremacy clause. *Williams*, slip op. at 7, *quoting* Chapman v. Houston Welfare Rights, Org., 441 U.S. 600, 613, 99 S. Ct. 1905, 1913-14 (1979). If the supremacy clause created enforceable rights, the holdings in *Pennhurst* and *Sea Clammers* would be undermined. Any violation of a federal statute under color of state law would be a "violation" of the supremacy clause and, therefore, the basis of a § 1983 action. *Pennhurst* and *See Clammers* establish, though, that not every federal statute will support a § 1983 action. The court of appeals decision, then, conflicts with these recent Supreme Court cases. Furthermore, if the supremacy clause created substantive rights, then the phrase "and laws" in § 1983 would be superfluous because any violation of a federal statute, under color of state law, would be a constitutional violation. We will not construe the statute in such a manner. *See Chapman*, 441 U.S. at 621-23, 99 S. Ct. at 1918-19 (1979), *quoting* Georgia v. Rachel, 384 U.S. 780, 789-92, 86 S. Ct. 1783, 1788-90 (1966); *Williams*, slip op. at 18 (no cognizable rights under § 1983 were created merely as a result of preemption under the supremacy clause); *Gould, Inc.* 750 F.2d at 616 (supremacy clause violation does not present a cognizable claim under § 1983).

Our position is supported by *Chapman, supra.* In *Chapman*, the Supreme Court held that the supremacy clause did not create substantive rights within the meaning of 28 U.S.C. § 1343(3). *Id.* at 614-15, 99 S. Ct. at 1914-15. Section 1343(3) grants federal courts jurisdiction "[t]o redress the deprivation, under color of any State law, . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights. . . ." The Court held that "to give meaning to the entire statute [§ 1343] as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution'. . . ." 441 U.S. at 615, 99 S. Ct. at 1915. Similarly, an allegation of incompatibility between the Arizona sales tax and the Indian trader statutes cannot support a § 1983 action.

In conclusion, the state has not subjected Central Machinery or the Indian River Farms to a deprivation of rights, privileges or immunities secured to them by the Constitution and laws of the United States. The § 1988 claim must fail because the original tax refund action is not cognizable under § 1983.

The opinion of the court of appeals affirming an award of attorney's fees to Central Machinery is vacated. Central Machinery's motion for attorney's fees under 42 U.S.C. § 1988 is hereby dismissed.

JACK D. H. HAYS, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

Appendix B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CENTRAL MACHINERY COMPANY, an Arizona corporation, *Plaintiff-Appellee,* v. STATE OF ARIZONA, *Defendant-Appellant.*	1 CA-CIV 7779 DEPARTMENT D OPINION Filed June 27, 1985 [Review granted by Arizona Supreme Court January 21, 1986]

Appeal from the Superior Court of Maricopa County
Cause No. C-297870
The Honorable William T. Moroney, Judge
AFFIRMED

Rodney B. Lewis
Attorney for Central Machinery Company — Sacaton

Robert K. Corbin, Attorney General
by Anthony B. Ching, Solicitor General
Attorneys for State of Arizona — Phoenix

MEYERSON, Judge

In *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed.2d 555 (1980), the United States Supreme Court held that 42 U.S.C. § 1983 provides a cause of action to enforce substantive rights granted by federal statutes. The issues in this case is whether the Indian trader statutes, 25 U.S.C. §§ 261-64, create such rights thereby entitling plaintiff-appellee Central Machinery Company (Central Machinery)

to recover attorneys' fees under 42 U.S.C. § 1988.[1]. We hold that substantive rights are created by the Indian trader statutes and therefore affirm the trial court's judgment granting fees to Central Machinery.

I. BACKGROUND

This dispute began in 1973 when Central Machinery sold farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe (Tribe). The State of Arizona imposed a transaction privilege tax on the sale of the tractors. The tax was passed on to Gila River Farms. Central Machinery paid the tax under protest and initiated state administrative proceedings to claim a refund.

Central Machinery's claim ultimately reached the United States Supreme Court. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S. Ct. 2592, 65 L. Ed.2d 684 (1980). Relying upon its earlier decision in *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed.2d 165 (1965), the Court held that the Indian trader statutes preempted Arizona's imposition of sales tax on the transaction.

On remand, Central Machinery attempted to recover attorney's fees under 42 U.S.C. § 1988. It argued that its preemption claim was cognizable under 42 U.S.C. § 1983 thereby entitling it to an award of fees. The superior court granted fees to Central Machinery[2] and defendant-appellant State of Arizona has filed this appeal.

II. 42 U.S.C. § 1983

The Civil Rights Act of 1871, 42 U.S.C. § 1983, establishes a cause of action on behalf of any party who has been injur d, under color of law, through the deprivation of any

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[1] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes reasonable attorney's fees to the prevailing party in actions brought under certain statutes, including 42 U.S.C. § 1983

[2] The parties agreed that Gila River Farms would bear the costs and legal fees throughout the litigation and that any recovery of fees would be transmitted to it.

"rights, privileges, or immunities secured by the Constitution and laws" of the United States. The question before the Supreme Court in *Maine v. Thiboutot* was "whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws." 448 U.S. at 4. The Supreme Court rejected the contention that the phrase "and laws" should be read as limited to civil rights or equal protection laws. The Court held that 42 U.S.C. § 1983 encompassed claims based on purely statutory violations of federal law and further concluded that the attorney's fees provisions of 42 U.S.C. § 1988 were therefore applicable.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed.2d 694 (1981), the Supreme Court indicated in dictum that two factors may limit the existence of a cause of action under § 1983. First, the statute must provide substantive rights to those who seek to bring an action to enforce the statute. Second, the Court indicated that there might be no remedy under § 1983 if any express remedy contained in the statute is exclusive. The second limitation was expanded upon in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct., 2615, 69 L. Ed.2d 435 (1981). In that decision, the Court found that expressly created statutory remedies in two federal statutes manifested congressional intent that a supplemental remedy under 42 U.S.C. § 1983 was precluded.

The Indian trader statutes make no reference to any statutory remedy. Therefore, we are not concerned in this decision with the second limiting factor enunciated by the Supreme Court. Rather, we are concerned with the first limitation, namely whether the Indian trader statutes create enforceable rights.

III. INDIAN TRADER STATUTES

Comprehensive federal regulation of Indian traders has existed from 1790 until the present day. The Commissioner of Indian Affairs is vested with the "sole power and authority to appoint traders to the Indian tribes" and to

specify the "kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261. Pursuant to the authority of the Indian trader statutes, the Commissior of Indian Affairs has promulgated detailed regulations prescribing the manner in which trade shall be carried on with Indians. *See generally* 25 C.F.R. §§ 140.1, -.26 (1984). In *Warren Trading Post Co.*, the United States Supreme Court held that the Indian trader statutes and the regulations promulgated thereunder preempted the ability of the State of Arizona to impose a sales upon a company engaged in retail trading business with Indians on the Arizona part of the Navajo Indian Reservation. In *Central Machinery Co. v. Arizona State Tax Comm'n*, the Court extended its holding in *Warren Trading Post Co.* to a situation involving an Indian trader who was not licensed and who did not have a permanent place of business on the reservation.

The Supreme Court's characterization of the Indian trader statutes in *Warren Trading Post Co.* is determinative of this appeal:

> We think that assessment and collection of this tax would to a substantial extent frustrate the evident *congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians* on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals . . . and could thereby disturb and disarrange the *statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.*

380 U.S. at 690-91 (emphasis added). The Court's description of the Indian trader statutes reflects its conclusion that Congress' intent in passing the statutes was to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner" We conclude that the Indian trader statutes therefore establish enforceable rights and thus fit

within the phrase "and laws" contained in 42 U.S.C. § 1983. *See Chase v. McMasters*, 573 F.2d 1011 (8th Cir. 1978), *cert. denied*, 439 U.S. 965, 99 S. Ct. 453, 58 L. Ed.2d 423 (1978).

IV. ANALYSIS

We believe that our conclusion is also supported by the decision of the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. Williams*, No. 81-5348 (9th Cir. Feb. 7, 1984), *rehearing granted*, (April 25, 1984). In that case, the court held that preemption of Arizona state taxes by a federal law regulating the harvest and sale of tribal timber did not create rights enforceable under § 1983. The court's reasoning combined with the interpretation of the Indian trader statutes given by the Supreme Court in *Warren Trading Post Co.* requires that we reach the contrary result in the present case.

In *White Mountain Apache Tribe*, the court noted that the "availability of a § 1983 cause of action for state violations of federal statutory law depend[s] upon congressional intent in passing the statute at issue." Slip op. at 14. The court recognized that a preemption claim under a federal statute may give rise to a § 1983 cause of action. *Id.* at 16. *But cf. Gould, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations*, 750 F.2d 608 (7th Cir. 1984), *review granted*, 53 U.S.L.W. 3821 (U.S. May 20, 1985) (No.

84-1484). As the court noted, the question becomes one of congressional intent. [3]

In light of *Warren Trading Post Co.*, we must necessarily conclude that the Indian trader statutes do evidence a congressonal intent to create enforceable rights. As explained by the United States Supreme Court, the purpose behind these statutes is to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691. We view this statement as an express indication by the Supreme Court that Congress intended that for the benefit and protection of Indians, the tribes were entitled to the right to be free from state taxation on their transactions with traders.

The State of Arizona relies heavily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 126, _____ L. Ed.2d _____ (1984). In that decision, the plaintiff has been successful in invalidating Iowa's ban on 65-foot twin trailer trucks under the commerce clause. The plaintiff then sought fees alleging that the commerce clause claim was cognizable under § 1983. The court rejected the request finding that the commerce clause did not grant enforceable rights but rather allocated power between the state and federal governments. *Id.* at 1144. Thus, the decision is not at all analogous

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[3] Despite a persuasive dissent, a majority of the court found that the central purpose of the federal law regulating the harvest of timber on Indian reservations was merely to grant to the Secretary of the Interior authority to regulate the harvest and sale of the tribe's own timber. Thus, the court concluded that the statute created no new rights. The court further concluded that Congress' purpose in promoting tribal self-government likewise gave rise to no rights cognizable under § 1983. The court viewed the federal statute as allocating the power to tax the timber activities among different sovereigns and that the distribution of such powers between a state and an Indian tribe was outside the scope of § 1983.

The dissent concluded that the federal law reflected a congressional intention to benefit specially Indian tribal timberland owners and to confer federal rights upon them. The dissent appears to us to have the better argument.

because here we are concerned with a supremacy clause claim predicated upon a federal law which has as its avowed purpose the protection of Indians in their business relationships with traders.

Our holding is also consistent with the Ninth Circuit decision in *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983). In that decision, the court rejected the contention that the plaintiffs had a § 1983 claim under the River and Harbor Improvements Act. The court found that the purpose of the act was to "improve navigation, enhance commerce, and reduce vehicle-vessel traffic problems, *all to the benefit of the general public.*" *Id.* at 673 (emphasis added). The court concluded that there was no "evidence whatsover of an intent" to create "any special benefit" for the class of pleasure craft owners. *Id.* at 673-74. The River and Harbor Improvements Act can easily be contrasted with the Indian trader statutes by virtue of the Supreme Court's clear characterization of Congress' intent under the Indian trader statutes to benefit and protect Indians in their dealings with traders.

The Ninth Circuit Court of Appeals in *White Mountain Apache Tribe* acknowledges that claims under the supremacy clause may involve rights enforceable under § 1983. For the foregoing reasons, we hold that such a claim has been presented in this matter and we therefore affirm the ruling of the superior court. [4]

Bruce Meyerson, Presiding Judge

CONCURING:

Sarah D. Grant, Judge

Levi Ray Haire, Judge

[4] The State's final argument can be easily dismissed. The State argues that only Congress, not the courts, can authorize attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 420, 95 S. Ct. 1612, 44 L. Ed.2d 141 (1975). Because the Indian trader statutes make no reference to fees, the State alleges that a fee award is impermissible. But Congress has expressly provided for an award of fees in § 1983 suits. 42 U.S.C. § 1988. We have determined that Central Machinery's claim is one properly brought under § 1983 and therefore the provisions of 42 U.S.C. § 1988 are appliacable.

Appendix C

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

CENTRAL MACHINERY COMPANY vs. STATE OF ARIZONA, et al	Pat Irvin __ Associate Rodney B. Lewis P.O. Box 416 Sacaton, Arizona 85247 Attorney General by: Ian A. MacPherson

The Plaintiff is an Arizona corporation with principal offices in Casa Grande Late in 1973, after a period of negotiation, the Plaintiff sold ten tractors to Gila River Farms, an entity of the Gila River Indian community. It collected an Arizona sales tax from Gila River Farms, which was paid to the Defendant under protest. By this cause of action the Plaintiff has sought an adjudication that the transaction for the sale of the tractors was not subject to the Arizona sales tax. It is the Plaintiff's position that dealing with Indians on an indian reservation is a transaction preempted by federal law, and therefore not subject to taxation by the State.

The underlying issue in this case proceeded through the Appellate Courts all the way to the United States Supreme Court where the Plaintiff's position was vindicated.

The Plaintiff now seeks an award of attorney's fees under provision of 42 U.S.C. 1988. In pertinent part, that statute provides that, in any action to enforce a provision of 42 U.S.C. 1983, the Court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Section 1983 provides, as it applies in this case, that a government which, under color of law, causes a person to be subjected to deprivation of any rights, privileges or immunities secured by, "the constitution and laws," shall be liable to the party injured.

The Plaintiff's position is that the words, "and laws," makes the scope of Section 1983 such that it pertains to statutory rights, as well as those protected by the constitution. According to the Plaintiff, this is the clear holding in *State of Maine vs. Thiboutot.* In Thiboutot, an award of attorneys fees under Section 1988 was upheld when the right, privileges or immunities of Thiboutot of which he was deprived by the State of Maine were conferred on him by the Social Security Acts. In Thiboutot, the Court held that congress did not intend to limit the application of Section 1983 to constitutional rights, but also those conferred by statute.

The Defendant argues that Sections 1983 and 1988 apply only to "Civil Rights" cases, and urges the Court to distinguish rights, privileges or immunities conferred by the Social Security Act as being more nearly analogous to a "civil right" than rights, privileges or immunities conferred by the Indian Trader Statutes. This is a distinction the Court can not make.

The Defendant also urges that, in order for Section 1983 to apply, the cause of action must have been predicated upon Sec. 1983 by specific language in the Complaint.

With this the Court disagrees.

The Defendant further urges that the Court has an insufficient basis in the record on which to make an award of attorneys fees to the Plaintiff. With this, the Court agrees.

IS IS THE RULING OF THIS COURT that an award of attorneys fees may be made in this cause pursuant to 42 U.S.C. 1988.

IT IS FURTHER ORDERED setting October 27, 1981, at 8:30 a.m. in this Division for hearing on the amount that should be awarded. Seven (7) days prior to the hearing, the parties are requested to meet and exchange a list of witnesses and those exhibits which they might propose to present at the hearing. This order does not preclude any discovery which any party may wish to under take in the meantime.

Appendix D

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC., and LEMBKE CONSTRUCTION COMPANY, INC.

Petitioners-Appellees,

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent-Appellant

No. 7960
Filed
January 7, 1986
[Petition for
Writ of
Certiori,
No. 86-367
denied
November 3, 1986]

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY

Petra Maes, Judge

PAUL G. BARDACKE, Attorney General
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& ROGERS
Santa Fe, New Mexico
Attorneys for Petitioners-Appellees

OPINION

BIVINS, Judge

We withdraw the opinion filed on December 12, 1985, and substitute the following.

From an order awarding Petitioners Ramah (Ramah School Board, Inc., and Lembke Construction Company, Inc.) attorney's fees pursuant to 42 U.S.C. Section 1988 following remand from the United States Supreme Court,

respondent Bureau (Bureau of Revenue, State of New Mexico) appeals. The Bureau raises three issues:

1. Whether Ramah's complaint sufficiently pled a 42 U.S.C. Section 1983 violation so as to allow an attorney's fee award under section 1988;

2. Whether the Bureau is a "person" within the meaning of Section 1983; and

3. Whether the complaint states a cause of action cognizable under Section 1983.

We answer each issue in the affirmative and, therefore, affirm.

In 1978, Ramah sued for a refund of gross receipts taxes paid. This court affirmed a judgment in favor of the Bureau. *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 95 N.M. 708, 625 P.2d 1225 (Ct.App.1980), *cert. quashed*, 96 N.M. 17, 627 P.2d 412 (1981), *rev'd*, 458 U.S. 832 (1982). Ramah petitioned the United States Supreme Court which reversed on the basis that federal law preempted the assessment of the New Mexico tax on proceeds from the construction of a school on the Ramah Navajo reservation. *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).

Following remand, Ramah filed a motion for an award of attorney's fees under Section 1988, the Federal Civil Rights Attorney's Fees Awards Act. After a hearing, the trial court awarded to Ramah attorney's fees. The parties stipulated as to the amount; therefore, the issue on appeal involves only the legality of the award.

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress authorized the awarding of attorney's fees in a number of specific civil rights actions. The Act, in pertinent part, provides for the allowance of attorney's fees:

> [I]n any action or proceeding to enforce a provision of sections [42 U.S.C. §§] 1981, 1982, *1983*, 1985 and 1986 title IX of Public Law 92-318, [or in any civil action or proceeding, by or on behalf of the United States of

> America, to enforce, or by charging a violation of, a provision of the United States Internal Revenue Code], or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of costs.

42 U.S.C. § 1988. (Emphasis added.)

Ramah claims entitlement to Section 1988 attorney's fees because its original action qualifies as one to enforce a provision of Section 1983, and because it prevailed in the lawsuit.

Section 1983 provides:

> Every person who, acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In order for Ramah to succeed, it must have pled a Section 1983 cause of action; the Bureau must be a "person" within the meaning of Section 1983; and the cause of action must be one that is cognizable under Section 1983. The Bureau claims that Ramah fails each of those requirements. We now examine the Bureau's contentions.

1. **Did the complaint sufficiently plead a Section 1983 violation?**

In *Gomez v. Toledo*, the United States Supreme Court stated that by its "plain terms," Section 1983 requires "two- and only two-allegations." 446 U.S. 635, 640 (1980). First, the plaintiff must allege that he was deprived of a federal right. Second, the plaintiff must contend that the person

who deprive him of the federal protected right was acting under the color of state or territorial law. *Id.*

While the Supreme Court, in *Gomez*, was discussing the standard of pleading required in a Section 1983 action when qualified immunity is at issue, lower courts, in cases more factually similar to ours, have basically reiterated the *Gomez* standard of pleading. For instance, in *Harradine v. Board of Supervisors*, a voting rights case, the plaintiff argued that the distribution and apportionment of the Board violated the equal protection clause of the Fourteenth Amendment and sections of the New York constitution. 73 A.D.2d 118, 425 N.Y.S.2d 182 (1980). The plaintiff prevailed in the suit and then sought attorney's fees under Section 1988 even though he had specifically alleged, in his complaint or at trial, a Section 1983 violation. Accordingly, the question before the *Harradine* court, was whether a plaintiff who prevails in a state court suit, not arguing a Section 1983 violation but seeking to vindicate a federal civil right, should be allowed to recover Section 1988 attorney's fees. In answering that question, the court first noted that the purpose of Section 1988 was to encourage private citizens to act as private attorneys general in enforcing civil rights and that Section 1988 should be construed so as to effectuate that purpose. The court, therefore, allowed recovery on the basis that "[t]he Civil Rights Attorneys Fees Awards Act must be broadly applied to achieve its remedial purpose." *Id.* at _____, 425 N.Y.S.2d at 188.

Similarly, in *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied*, 459 U.S. 1103 (1983), the plaintiff argued in his complaint that the Board's denial of his license application violated his rights under the First, Fifth, and Fourteenth Amendments as well as Article 1, Section 8 of the United States Constitution. The plaintiff failed to plead specifically a Section 1983 violation. The plaintiff prevailed at trial with the court not reaching his claimed constitutional violations. He then sought attorney's fees under Section 1988. While acknowl-

edging that "the better practice is to specifically plead a violation of Section 1983," the Kansas Supreme Court invoked Kansas' liberal rules of notice pleading to rule that the plaintiff had adequately pled a violation of his civil rights. *Id.* at 514, 646 P.2d at 1085. *See also Fairbanks Correctional Center Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979); *Boldt v. State*, 101 Wis.2d 566, 305 N.W.2d 133, *cert. denied*, 454 U.S. 973 (1981). This result is consistent with New Mexico's liberal rules of notice pleading. *See* N.M. Civ.P. Rule 8 (Repl. Pamp. 1980); *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982).

Ramah specifically alleged that the Bureau, in implementing its tax program, was acting "under color of the New Mexico Gross Receipts and Compensating Tax Act." and that the tax "constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 *and the laws of the United States.*" [Emphasis added.] Based on these authorities and the pleadings, we hold that Ramah's failure to plead specifically a Section 1983 violation does not bar its recovery of Section 1988 attorney's fees.

Two recent New Mexico cases do no persuade us differently. Both are distinguishable from the present case. In *Garcia v. State Board of Education*, this court denied plaintiff's request for attorney's fees, a request first asserted on appeal. 102 N.M. 306, 694 P.2d 1371 (Ct.App.), *cert. quashed*, 102 N.M. 293, 694 P.2d 1358 (1985). We based our refusal on five grounds: first, the action was not brought under Section 1983; second, the plaintiff did not plead or prove that his civil rights were violated; third, the plaintiff did not prevail in the lawsuit; fourth, the plaintiff offered no proof that a Section 1988 award can be made when a Section 1983 claim is raised, for the first time, on appeal; and, fifth, Section 1988 does not authorize an award of attorney's fees in an administrative proceeding.

In this case, Ramah prevailed. Ramah also demonstrated that a Section 1988 award may be made even though the case was not specifically litigated under Section 1983. Ramah did argue, in its complaint, that a federal right had been violated. Finally, this case does not involve an administrative proceeding.

In *Chapman v. Luna*, the plaintiffs prevailed, in part, in their challenge to the Albuquerque/Bernalillo County Motor Vehicle Emission Inspection Program. 101 N.M. 59, 678 P.2d 687 (1984). On remand to the district court, plaintiffs sought Section 1988 fees because the state supreme court had ruled that a provision of the emissions inspection program violated "equal protection standards." In plaintiffs' complaint, however, they had failed to refer specifically to the New Mexico Constitution, the United States Constitution, Section 1983, or Section 1988. The district court rejected plaintiffs' claim to Section 1988 fees, and the state supreme court affirmed. 102 N.M. 768, 701 P.2d 367, *cert. denied*, _____ U.S. _____, 106 S.Ct. 345 (1985).

The supreme court held that the plaintiffs were unable to show that a "deprivation of a federal constitutional right was raised and decided in their favor. . . ." 102 N.M. at 769, 701 P.2d at 368. The supreme court stated that in deciding *Chapman v. Luna*, while not specifically referring to the United States Constitution or the New Mexico Constitution, the court had based its decision on a violation of the New Mexico equal protection clause. Because the plaintiffs had not pled a federal claim and the court did not decide the case on the basis of a federal claim, the case was not decided under the federal Constitution. Therefore, an award of Section 1988 attorney's fees would not be appropriate. The court did indicate, however, that it might have reached a different conclusion if the plaintiffs had specifically pled a federal equal protection claim *or* a Section 1983 claim, and the court had decided the case on the basis of a federal claim.

Chapman, therefore, is distinguishable from our case. Ramah did specifically plead violations of federal law, and the case was decided on federal grounds.

The Bureau also argues that Ramah erred in not expressly praying in its complaint for the award of Section 1988 attorney's fees. This argument is not convincing. By its express language, Section 1988 dictates that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of costs*." (Emphasis added.) Each of the counts in Ramah's complaint contained a prayer for relief which stated "for *costs* of this action, and further such relief as to the Court seems just." (Emphasis added.) Additionally, the concluding prayer requested, in addition to the tax refund, the declaratory judgment, and the injunction, "Such other relief, *including costs*, interest, and so on, as the Court deems proper." (Emphasis added.) Therefore, Ramah's failure to pray expressly for Section 1988 attorney's fees is not fatal to the award of attorney's fees. *See also Maine v. Thiboutot*, 448 U.S. 1 (1980).

2. **Whether the Bureau is a "person" within the meaning of Section 1983.**

At the onset of this discussion, we recognize that the United States Supreme Court, in *Hutto v. Finney*, ruled that in passing Section 1988, Congress partially abrogated states' Eleventh Amendment immunity, pursuant to its plenary power to enforce the Fourteenth Amendment. 437 U.S. 678 (1978). The Court's ruling in *Hutto*, however, does not resolve the problem before us. In order to determine whether the trial court erred in awarding to Ramah Section 1988 attorney's fees, we must first decide whether Ramah pled a Section 1983 violation. Accordingly, we must determine whether the Bureau is a "person" within the meaning of Section 1983, and, therefore, capable of violating that section.

The question requires an analysis of congressional intent. For a long time, the anser, if not the rationale, was clear. Recent decisions, however, have resulted in a different

understanding of the class of defendants made liable by Congress under Section 1983. Consequently, a more extensive analysis than was formerly required becomes necessary.

When Congress enacted Section 1983, it chose not to abrogate the state's sovereign immunity or Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object—state government. *Civil Actions Against State Government: Its Divisions, Agencies and Officers*, (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. *Id.* Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendent is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereignty immunity bars the suit. *Gumbhir v. Kansas State Board of Pharmacy*.

Before 1977, the belief generally held was that state agencies were not persons within the meaning of Section 1983. *Gumbhir v. Kansas State Board of Pharmacy*. In 1978, the United States Supreme Court handed down a landmark decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Court ruled that the Eleventh Amendment did not bar suit under Section 1983 against municipalities and other local governments. Municipalities and local governments, therefore, were "persons" under Section 1983.

The Court's ruling, in *Monell*, created confusion in the lower courts. Some courts, in the wake of *Monell*, reasoned that there is no logical reason to distinguish between state and local agencies and, arccordingly, ruled that states are

"persons." *Stanton v. Godfrey*, 415 N.E.2d 103 (Ind.App.1981); *Atchison v. Nelson*, 460 F.Supp. 1102 (D.Wyo.1978). Most courts, however, have determined that *Monell* did nothing to alter either the Eleventh Amendment or sovereign immunity protective cloak of the states. *Holladay v. State of Montana*, 506 F.Supp. 1317 (D.Mont.1981) (memo.op.); *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir.1980).

That the Eleventh Amendment is still a vital bar to a Section 1983 cause of action, in federal court, against a state or its agencies was articulated by the United States Supreme Court in *Quern v. Jordan*. The Court held that Congress, in enacting Section 1983, did not intend to destroy the states' Eleventh Amendment immunity from suits brought in federal court. *Quern*. It, therefore, logically follows that Congress also did not intend, in adopting Section 1983, to abrogate the states' sovereign immunity from Section 1983 suits brought in state courts. Suits against states or their agencies, however, may be brought under Section 1983 in state or federal court if the state has waived its Eleventh Amendment or sovereign immunity, by expressly consenting to suit. *Boldt v. State*.

The Eleventh Amendment immunity, nevertheless, is not absolute. The United States Supreme Court has carved out an exception: prospective injunctive relief. In *Edelman v. Jordan*, the Court ruled that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessary limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . ." 415 U.S. 651, 677 (1974) (citations omitted). In *Milliken v. Bradley*, the Court ruled that the prospective relief can require the expenditure of state funds so long as the relief comes into effect prospectively. 433 U.S. 267 (1977).

Lower federal courts, when confronted with the question of whether the state or its agency is a "person" under Section 1983, appear to analyze what relief is sought. If the

plaintiff seeks prospective injunctive relief, the Eleventh Amendment will not bar the suit. If, however, the plaintiff seeks monetary damages, the Eleventh Amendment precludes the cause of action. *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M.1980); *Gay Student Services v. Texas A & M University*, 612 F.2d 160 (5th Cir.), *cert. denied*, 449 U.S. 1034 (1980).

State courts, however, have not uniformly distinguished on the basis of relief sought whether sovereign immunity is a bar to a Section 1983 action. In *DeVargas v. State, ex rel. New Mexico Department of Corrections*, in which the plaintiff sought damages under Section 1983, this court ruled that the suit was a "nullity" because "[t]he State and its Department of Corrections are not persons within the meaning of § 1983." 97 N.M. 447, 449, 640 P.2d 1327, 1329 (Ct.App.1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982). This court did not, however, explain the rationale for its decision. Therefore, there are two possibilities as to the relevant law in New Mexico. First, it may be that the state and its agencies never are "persons" within the meaning of Section 1983; or, it may be that because the plaintiff sought damages in *DeVargas*, rather than prospective injunctive relief, the court ruled that the doctrine of sovereign immunity blocked the suit.

The second standard offers the better reasoned approach. While, as discussed earlier, the Eleventh Amendment and sovereign immunity are distinct concepts, each seeks to provide protection for the state treasuries. If the Eleventh Amendment does not bar a suit in which prospective injunction relief is sought, there is no logical reason why sovereign immunity should bar such a suit in state court. Accordingly, the Kansas Supreme Court, in *Gumbhir v. Kansas State Board of Pharmacy*, ruled that "the sounder view in a case such as this, where prospective relief is sought, is that a state agency should be considered a 'person' under [§ 1983]." 231 Kan. at 513, 646 P.2d at 1084. *See also Woodbridge v.*

Worcester State Hospital, 384 Mass. 38, _____, 423 N.E.2d 782, 786 n.7 (1981).

We note that in order to avoid the defense of Eleventh Amendment immunity, a plaintiff in federal court may be required to name an individual state officer as defendant. *See generally Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977) (noting the history of the prospective-compliance exception reaffirmed in *Edelman v. Jordan*). The requirement that a plaintiff in federal court name a state officer as defendant is based on the fiction that in violating federally-protected rights, the state officer is "stripped of his official or representative character." *Ex parte Young*, 209 U.S. 123, 160 (1908). Because Ramah sued in state court, this particular aspect of Eleventh Amendment immunity is not relevant. We agree with the Kansas Supreme Court that, after *Monell*, a state and its agencies may be proper defendants in state court under Section 1983, provided principles of state sovereignty do not preclude recovery. *See Gumbhir*. For this reason, we reject the Bureau's contention on appeal that Ramah's complaint was defective because it named the agency rather that its director.

Therefore, in order to determine if the Bureau is a person, we analyze separately each relief sought by Ramah. Ramah sought three remedies: first, a refund of the tax monies; second, a declaratory judgment that imposition of the tax, in this case, was beyond the jurisdiction of the Bureau; and, finally, a permanent injunction, enjoining the Bureau from further taxation of the construction project.

In its complaint, Ramah prayed for a tax refund, pursuant to NMSA Section 72-13-40(A)(2) (Supp. 1975) (now codified as NMSA 1978, Section 7-1-26(A)(2). In enacting that statute, the legislature clearly consented to suit, allowing a claimant to bring action against the state for a tax refund. We do not believe, however, that in enacting this statute, the state consented to suit under Section 1983.

The statute contains absolutely no reference to Section 1983, the United States Constitution, or the laws of the

United States. *See* NMSA 1978, § 41-4-4 (Repl.Pamp.1982). Additionally, the request for the tax refund is a recovery more akin to money damages than to prospective injunctive relief. In *Edelman v. Jordan*, the plaintiffs argued that the defendants were not promptly processing, as authorized, assistance applications. The court of appeals allowed the plaintiffs to recover those funds which were denied by the tardy processing of the applications. The appeals court justified the refund on the basis of "equitable restitution." The United States Supreme Court rejected such a characterization and ruled that the refund violated the Eleventh Amendment. The Court stated that such an award was "in practical effect indistinguishable in many aspects from an award of damages against the State." 415 U.S. at 668. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (Eleventh Amendment bars suit in federal court for tax refund).

We, therefore, hold that in allowing suits against the state for tax refunds, the legislature did not intend to waive the state's sovereign immunity for suits brought under Section 1983. *See Boldt v. State.* Furthermore, Ramah's request for a tax refund essentially was a request for "equitable restitution." If posed in terms of Section 1983, the claim would have been barred by the doctrine of sovereign immunity.

Next, Ramah requested a declatory judgment ruling that the imposition of the gross receipts tax, in this case, was beyond the jurisdiction of the Bureau. Ramah requested the declaratory judgment pursuant to the New Mexico Declaratory Judgment Act. NMSA 1953, §§ 22-6-1 through 22-6-18 (Supp. 1975) (now codified at NMSA 1978, §§ 44-6-1 through 44-6-15). Section 22-6-16 of the 1975 supplement provides:

> For the purpose of the Declaratory Judgment Act, the state of New Mexico, or any offical thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the Constitution of the state of New Mexico, the Constitution of the United States or any of

> the laws of the state of New Mexico or the United States, or any statute thereof.

(Citation omitted).

While this statute contains no express reference to Section 1983, it does provide that the state has waived its sovereign immunity for the purpose of suits seeking "a construction of" the Constitution and laws of the United States. Such declarations do not entail awards of money damages. Therefore, it is completely consistent with the notions of sovereign immunity to rule that for the purpose of Section 1983 causes of action seeking declaratory relief, the state has waived its sovereign immunity.

In its complaint, Ramah requested an interpretation of the New Mexico Constitution, the United States Constitution, and the laws of the United States. Section 22-6-16 is, therefore, precisely on point. For purposes of the declaratory judgment in this action, New Mexico has consented to suit.

Finally, Ramah sought a permanent injunction against the imposition of the gross receipts tax on the school construction project. This clearly represents a request for prospective injunctive relief. The doctrines of Eleventh Amendment and sovereign immunity do not bar such suits. *Edelman v. Jordan; Gumbhir v. Kansas State Board of Pharmacy.* Therefore, for the purpose of the prospective injunctive relief, the Bureau is considered a "person" within the meaning of Section 1983.

After separately analyzing the three remedies which Ramah sought, it becomes apparent that the Bureau may not be considered a "person" for purpose of the refund (because sovereign immunity precludes such a claim being brought under Section 1983), but that the Bureau may be considered a "person" for purposes of the declaratory and injunctive relief. Such inconsistency is not fatal to Ramah's claim. In *Edelman v. Jordan,* the plaintiffs sought both damages and injunctive relief. Relying upon the Eleventh Amendment, the Court ruled that the suit was improper to the extent that monetary liability was sought. The suit was proper, however, insofar as prospective injunctive relief was requested. *See also Milliken v. Bradley.*

Applying that analysis to our case, the fact that the Bureau is not a "person" subject to liability under Section 1983 for the purpose of the refund recovery would not foreclose Ramah's statement of a cause of action under that section. Because the Bureau is considered a "person" for purposes of declaratory and injunctive recoveries, sovereign immunity concerns do not foreclose the determination of whether, in its complaint, Ramah stated a cause of action under Section 1983.

3. **Whether Ramah alleged the violation of a right actionable under Section 1983.**

That Ramah sufficiently alleged that the Bureau, acting under color of state law, interfered in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States does not itself justify an award of attorney's fees under Section 1988. There must be a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In short, there must be a violation of a federally protected right.

Prior to 19 , the prevailing attitude was that the phrase "and laws" was limited to civil rights or equal protection laws. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). In a 1980 decision, *Maine v. Thiboutot*, the United States Supreme Court, however, radically expanded the scope of Section 1983 protection. 448 U.S. 1 (1980). Relying, essentially, upon the plain meaning of the language of Section 1983, the Court held that because Congress had attached ' no modifiers" to the phrase "and laws," Section 1983 encompassed violations of federal statutory laws. *Id.* at 5. Accordingly, since the statutory action was appropriately brought as a Section 1983 action, and since Section 1983 makes no exception for statutory violations of Section 1983, Section 1988 attorney's fees clearly applied to that case.

Since deciding *Thiboutot*, however, the Court has narrowed the expansive scope of its ruling. Two limitations now preclude suit under Section 1983 based upon statutory violations. The first limitation arises when Congress includes within the legislation comprehensive remedial procedures.

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). The second limitation is more pertinent to the issue before us. In *Pennhurst State School and Hospital v. Halderman*, the Court ruled that in order for a statutory violation to give rise to a Section 1983 violation, the federal statute must have created a right, privilege, or immunity. 451 U.S. 1 (1981).

Because the Bureau relies heavily on *Pennhurst* in arguing that a federally protected right was not at issue in this case, we shall analyze *Pennhurst* in some depth. In *Pennhurst*, residents of a state hospital for the care of the mentally retarded challenged their conditions of confinement. The Third Circuit Court of Appeals issued a ruling in favor of the residents, holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act had been violated. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir.1979) (en banc).

On appeal, the Supreme Court, in determining whether Congress had intended, in passage of the Act, to create substantive, enforceable rights, first pinpointed the source of Congress' power to legislate. The Court concluded that the origin of the legislative power was Congress' spending power. When, pursuant to a federal grant program, Congress imposes enforceable, financial obligations on the states, Congress must "speak with a clear voice" in order to "enable the States to exercise their choice [to participate in the program] knowingly, cognizant of the consequences of their participation." 451 U.S. at 17. Because the "bill of rights" section of the Act contained no such express langauge, the Court held that the "bill of rights" was essentially precatory and, as such, unenforceable.

Ramah, in its complaint, based its suit on two, interrelated theories which are relevant to this appeal. The first theory was that the Bureau's imposition of the gross receipts tax on the school construction project unduly interfered with Navajo self-government, pursuant to the Indian Self-

Determination and Educational Assistance Act (25 U.S.C. §§ 450a-450n) and the Treaty of 1868. Second, Ramah argued that the Supremacy Clause barred the imposition of the gross receipts tax because the collection of the tax burdened and interfered with "a clear federal policy and program for the education of Indian children."

The Bureau is correct in its assertion that the Supremacy Clause, alone, does not create federal substantive rights but merely is a policy of federalism. *See Chapman v. Houston Welfare Rights Organization.* The Indian Self-Determination and Education Assistance Act provides no broad remedial procedures so the *Middlesex* limitation is not applicable. Ramah does not disagree; therefore, the appellate issue is whether Congress has created a federally-protected right which New Mexico violated in collecting the gross receipts tax. Under *Pennhurst*, we must examine the origin and nature of the Indian Self-Determination and Educational Assistance Act in order to resolve the issue. The Bureau contends that the Act merely declares federal policy. We disagree.

Congress, in its statement of findings and its declaration of the policy of the Act provided:

> § 450. Congressional statement of findings
>
> (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participations by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the

> life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.
>
> 25 U.S.C. §§ 450, 450a

At first examination, the Act might arguably fall within the limitation *Pennhurst* placed upon federal statutory violations giving rise to a Section 1983 proceeding. As the Bureau argues, it could be that the Act "merely declares the federal government's policy of encouraging Indian self-government and Indian control of Indian education." Cases which the Bureau cites lend some support to that position. For instance, in *Perry v. Housing Authority of the City of Charleston*, the tenants of public housing projects sought declaratory and injunctive relief from indecent housing. 664 F.2d 1210 (4th Cir.1981). They alleged that the defendant's violation of various housing acts gave rise to a Section 1983 violation. The court ruled, however, that the acts created no federally protected substantive rights. Rather, the federal appropriations were designed to assist the states in remedying poor housing conditions. *See also Weems v. Pierce*, 534 F.Supp. 740 (C.D.111.1982) (federal housing acts created no right to compel aid recipients to provide rental assistance); and *Dopico Goldschmidt*, 518 F.Supp. 1161 (S.D.N.Y.1981) (funding statutes created no substantive rights of handicapped access to mass transit). Applying a similar argument in our case, the Bureau contends that the Self-Determination and Educational Assistance Act conferred no rights upon Ramah but merely articulated Congress' encouragement of and assistance in the realization of Indian self-government and self-education.

The Bureau's argument, however, ignores the precise factual setting of this lawsuit. This case does not involve a federl/state funding statute such as generated the *Pennhurst* ruling. This case involves the unique relationship between the federal government and the Indian tribes. The source of Congress' power to legislate in federal grant cases is its spending power. In the grant cases, valid concerns legitimate courts' reluctance to interpret language in grant programs as creating substantive, enforceable federal rights. As one commentator has pointed out:

> Damages awards and attorney's fees, for example, may deplete funds from the very purposes which the program was meant to serve. There is the realistic possibility that, at least in the case of marginal programs, governments will decline to participate if they see serious, and unpredictable, costs. Additionally, extensive judicial involvement blurs matters of accountability.

Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 De Paul L.Rev. 31, 55 (1984).

In our case, however, the origin of Congress' legislative authority was the Indian Commerce Clause. U.S. Const. art. 1, § 8, cl. 3. Concerns in the federal grant area, which inhibit *Thiboutot*, are not at issue here. Under the Indian Commerce Clause, Congress has broad authority to regulate tribal affairs. *Morton v. Mancari*, 417 U.S. 535 (1974). Within that grant of power is the recognition of the guardian-ward relationship which exists between the federal government and the Indian tribes. *Id; U.S. v. Sandoval*, 231 U.S. 28 (1913). The guardian-ward relationship is based upon the tribes dependence on the federal government "to aid the Indian in coping with an alien civilization which has inexorably altered the Indian's traditional way of life." Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445, 450 (1970). Based upon this unique relationship, Congress, in enacting the Self-Determination and Educational Assistance Act, granted to the Indians the *right* to coordinate the education of their children on the reservation, in express recognition of the right's "crucial importance to the Indian people." 25 U.S.C. § 450(a)(3). By implication, Congress also granted the tribes an *immunity* from state taxation. The Bureau, by imposing the gross receipts tax on the school construction job, not only violated that right but also that immunity. *See Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

In its decision in this case, the United States Supreme Court not only recognized that the federal and tribal interests arise from the Indian Commerce Clause, but also recognized an additional, independent source, "the semiautonomous status of Indian tribes." 458 U.S. at 837. Either of

these "independent but related" interest bar exercises of state authority over commercial activity on Indian reservations. The Court quoted with approval:

> "[e]ither [interest], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad prower of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop, ... against which vague or ambiguous federal enactments must always be measured."

Id. at 837-38, *quoting from White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

While the Court relied, in its holding, on the Indian Commerce Clause, the result we reach today also finds support in the second barrier which the Court indicated could be used to block state intrusion on commercial activity on the reservation, the semi-autonomous status of the Indian tribes. The tribe's *right* of self-government, however, is limited by broad Congressional power. *Id.* Congress, in our case, however, did not abrogate that tribal right but articulated that right in the Indian Self-Determination and Educational Assistance Act. Congress, thereby, gave the full force and effect of federal law to the tribal right to control the educational processes on the reservation.

Our discussion might end here except for three cases concerning tribal claims for Section 1988 attorney's fees which, we believe, merit discussion. In *White Mountain Apache Tribe v. Williams*, No. 81-5348 (9th Cir.Dec.19, 1985), the Arizona Highway Department and the Arizona Highway Commission assessed a tax upon a logging company which had contracted with the White Mountain Apache Tribe. The tribe had organized a tribal enterprise to engage in the harvest of timber. The United States Supreme Court ruled that the state taxes were preempted by a comprehensive federal regulatory plan which supervised the harvest and sale of

tribal timber. *White Mountain Apache Tribe v. Bracker.* The tribe then requested an award of Section 1988 attorney's fees which the district court granted, and the Ninth Circuit Court of Appeals reversed. *White Mountain Apache Tribe v. Wiliams,* No. 81-5348 (9th Cir. Feb.7,1984). When we filed our first opinion, in this case, the Ninth Circuit had decided to reconsider its ruling. Since the filing of our first opinion, the Ninth Circuit has issued its second opinion, again reversing the district court. Because the Bureau relies heavily on this decision, we discuss it.

White Mountain is distinguishable from our case in two respects. First, the federal statutes at issue in *White Mountain* were regulatory in nature. There was no evidence of Congressional intent to create individual rights; whereas, in our case, the entire basis of the litigation was to provide a school for the Ramah children. While education does not rise to the level of a fundamental right. for equal protection purposes, "education is perhaps the most important function of state and local governments." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 29 (1973), *quoting from Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Similarly, it stands to reason that the education of Indian children is one of the most important functions that the tribal government performs. There can be no doubt but that the Self-Determination and Educational Assistance Act concerns "individual rights." If Ramah had not undertaken to operate a school system, the tribal children would have been forced either to curtail their educations or to leave the reservation in order to obtain educations. Either option would have been contrary to the essence of the Act.

Second, and more importantly, *White Mountain* is not inconsistent with the result which we reach today. The Ninth Circuit, relying on *Chapman v. Houston Welfare Rights Organization,* held that a violation of the Supremacy clause would not provide the basis for a Section 1983 cause of action. That holding is in accord with our result. Our case, however, is distinguishable. Congress here has created a federally enforceable right. Individual rights are presently at issue.

After we heard oral argument in this case, the Bureau directed our attention to additional authority, a recent federal district court opinion. *Yakima Indian Nation v. Whiteside*, No. C-83-604-JLQ (D.Wash. filed September 11, 1985). In that case, the court refused to find that the tribe's "right" to be free from the county's zoning authority was a federally enforceable right for purposes of Section 1983. According to the court, a Supremacy Clause violation alone, as in *White Mountain*, does not give rise to a Section 1983 cause of action. The court's holding also is consistent with the result we reach today. As with *White Mountain*, our case, however, is distinguishable. A right, cognizable under Section 1983, is here.

In a third recent case, the Arizona Court of Appeals ruled that the Indian trader statutes created rights enforceable under Section 1983. *Central Machinery Co. v. Arizona*, 12 Ind.L.Rptr. 5073 (June 27, 1985). Therefore, the Gila River Indian Tribe could recover Section 1988 attorney's fees. The tribe had prevailed in a lawsuit in which the United States Supreme Court ruled that the Indian trader statutes preempted Arizona's imposition of a transaction privilege tax upon a non-Indian tractor merchant. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The merchant, as in our case, had passed the tax on to the Indian purchasers.

In determining whether Congress intended to create a right enforceable under Section 1983, the Arizona court looked first to the purpose of the federal Indian trader statutes. Because the avowed Congressional intent was to protect the Indians from state taxation of their transactions with traders, the court translated that Congressional purpose into a federally protected right "to be free from state taxation on their transactions with traders." 12 Ind.L.Rptr. at 5074. The court's conclusion was reinforced by its finding that Congress intended to confer a "special benefit" upon the tribe.

If the *Central Machinery* standard is applied to the facts in our case, the inescapable conclusion is that the Self-Determination and Educational Assistance Act created rights enforceable under Section 1983. The express purposes

of the Act is to promote Indian self-determination and to facilitate tribally coordinated educational opportunities. Accordingly, those purposes can be translated into federally protected rights. Additionally, the language of the Act is not general or regulatory in nature but specifically aims toward providing a "special benefit" for tribal members. *See also The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Moe,* 392 F.Supp. 1297 (D.Mont.1974). [1]

In summary, we hold that the Indian Self-Determination and Educational Assistance Act created a right enforceable under Section 1983, and, therefore, that the trial court did not err in awarding Section 1988 attorney's fees to Ramah. First, the language and history of the Act evince a Congressional intent to create a tribal right to coordinate the education of its children. Second, recognition of the Indian right of self-government provides a 'backdrop ... against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 143. And, finally, Section 1988 should be construed liberally in order to realize the achievement of Section 1988's broad remedial purposes. *Harradine v. Board of Supervisors.*

The fact that Ramah prevailed in the litigation on the preemption claim rather than the violation of self determination claim is not relevant. Section 1988 attorney's fees are awarded so long as the prevailing party "essentially succeeds in obtaining the relief he seeks in his claim on the merits." *Bagby v. Beal,* 606 F.2d 411, 415 (3d Cir. 1979).

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[1] In *Moe,* the district court ruled that the tribe's allegation that the state had violated the Commerce Clause was sufficient to state a claim under Section 1983. In reviewing the district court's decision, the United States Supreme Court found it unnecessary to reach that question. 425 U.S. 463, 475 n.14 (1976). *But see Consolidated Freightways Corp. of Delaware v. Kassel,* 556 F.Supp. 740 (S.D.Iowa 1983) (Commerce Clause creates no rights enforceable under § 1983). The Bureau's strong reliance upon *Kassel* might be misguided because *Kassel* is not a case involving Indians.

The judgment below is affirmed. Ramah shall recover its costs on appeal.

IT IS SO ORDERED.

WILLIAM W BIVINS, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

PAMELA B. MINZNER, Judge

Appendix E

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. *United States Constitution Art. I § 8*

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

2. *42 U.S.C. § 1983.*

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. *42 U.S.C. § 1988.*

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil

or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceedings to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

4. *25 U.S.C. § 201.*

Penalties—How recovered

All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one-half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.
(R.S. § 2124.)

TRADERS WITH INDIANS

5. *25 U.S.C. § 261.*

Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules

6. *25 U.S.C § 262.*

Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of

Indian Affairs may prescribe for the protection of said Indians.
(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

7. *25 U.S.C. § 263.*

Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.
(R. S. § 2132.)

8. *25 U.S.C. § 264.*

Trading without license—White persons as clerks

Any person other then an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; Provided, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: And provided further, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.
(R. S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.)

SUBCHAPTER W—MISCELLANEOUS ACTIVITIES

9. *PART 251—LICENSED INDIAN TRADERS*

AUTHORITY: The provisions of this Part 251 issued under sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066, as amended; 25 U.S.C. 261, 262, unless otherwise noted.

SOURCE: The provisions of this Part 251 appear at 22 F.R. 10670, Dec. 24 1957, unless otherwise noted.

CROSS REFERENCES: For law and order regulations on Indian reservations, see Part 11 of this chapter. For regulations pertaining to traders on Navajo, Zuni, and Hopi reservations, see Part 252 of this chapter.

§ 251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.
(R. S. 2132; 25 U. S. C. 263)

§ 251.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.
(R. S. 2133, as amended; 25 U. S. C. 264)

§ 251.5 Government employees not to trade with Indians except in certain cases.

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U. S. C. 68a, 87a, 441), no person employed in

Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Empoyees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided*, That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further*, That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States employees, Indian blood.* Indian employees of the United States Government, of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian

tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to the valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the bais of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, _____, _____
(Name) (Title)

swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U. S. C. 68a, 87a, 441)

§ 251.6 Small purchases.

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

(R. S. 2078; 25 U. S. C. 68)

§ 251.8 Regulating sale of arms and ammunition.

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian county, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or cerdit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

(c) When a license or permit to trade is issued under the regulations in this Part 251, a fee of $5.00, payable when the license is issued, shall be levied against the licensee.
[30 F.R. 8267, June 29, 1965]

§ 251.11 License period.

Licenses to trade shall not be issued unless the proposed license has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years.
[30 F.R. 8268, June 29, 1965]

§ 251.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 251.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 251.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 251.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or pivileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 251.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 251.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 251.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsover. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 251.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescale bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 251.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 251.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 251.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

CROSS REFERENCES: For additional regulations pertaining to preservation of antiquities, see Part 132 of this chapter. For regulations of the Bureau of Land Management regarding antiquities, see 43 CFR Part 3.

§ 251.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

§ 252.27c Fees of governing body.
§ 252.28 Amendments.

AUTHORITY: The provisions of this Part 252 issued under sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066, as amended; 25 U.S.C. 261, 262, unless otherwise noted.

SOURCE: The provisions of this Part 252 appear at 22 F.R. 10672, Dec. 24, 1957, unless otherwise noted.

CROSS REFERENCES: For law and order regulations on Indian reservations, see Part 11 of this chapter. For regulations pertaining to traders on other reservations, see Part 251 of this chapter.

§ 252.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians of the Navajo, Zuni, and Hopi Reservations may, upon establishing the

fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 252.2 Presidential prohibitions.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to the Navajo, Hopi, and Zuni Indians and to direct that all licenses to trade with such tribes be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe or members of any other tribe residing on the Navajo, Zuni or Hopi Reservations.
(R.S. 2132; 25 U. S. C. 263)

§ 252.3 Forfeiture of goods.

Any person whether Indian or white who shall establish himself as a trader within the exterior boundaries of the Navajo, Hopi, or Zuni Reservations, or introduce goods or trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession and shall moreover be liable to a penalty of $500.
(R.S. 2133, as amended; 25 U. S. C. 264)

§ 252.4 Government employees not to trade with Indians.

No person employed by the United States Government shall have any interest or concern in any trade with the Indians, except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.
(R.S. 2078; 25 U. S. C. 68)

§ 252.5 Purchase in small quantities allowed.

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within

the meaning of section 2078 of the Revised Statutes. (R. S. 2078; 25 U. S. C. 68)

§ 252.6 Application for license.

Application for license or renewal of license must be made in writing on a form provided by the Commissioner of Indian Affairs, setting forth the full name and residence of the applicant and three responsible references. If applicant is a firm, the firm name and the name of each member thereof; the place where it is proposed to conduct the trading post; and upon the request of the superintendent, the capital invested or to be invested and of this the amount of capital owned and the amount borrowed, or to be borrowed; the name of the lender of the borrowed capital; the date due, the rate of interest to be paid; indorsers and security; copy of any contract or trade agreement, or agreements, oral or written, with creditors or financing individuals or institutions, including any stipulations whereby financing fees are to be paid, directly or indirectly, tending to restrict the trader as a bargainer in the wholesale markets or otherwise to increase the delivered wholesale costs of merchandise at the trading posts. Application must be accompanied by satisfactory evidence as to the character, experience, and business ability of applicant and his employees and their general fitness to reside on the Indian reservation.